(12)

No. 95-8836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER,
Petitioner,

v.

TONY TURPIN, WARDEN,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND JUSTICE FOR SURVIVING VICTIMS, INC. IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. §2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

(2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. §2241.

(3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, §9, clause 2 of the Constitution.

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INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37.3 of this Court, Washington Legal Foundation and Justice For Surviving Victims, Inc. respectfully submit this brief *amici curiae* in support of respondent. Written

consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest and expertise in criminal justice reform, the death penalty, and crime victims' rights. In that regard, WLF has appeared as *amicus curiae* in numerous cases before this Court. *See, e.g., McCleskey v. Kemp*, 107 S.Ct. 1756 (1987); *Payne v. Tennessee*, 111 S.Ct. 2597 (1991); *Davis v. United States*, 114 S.Ct. 2350 (1994).

Justice For Surviving Victims, Inc. (JSV) is a volunteer organization designed to elevate the status of victim participation in the American justice system. With more than 150,000 members and supporters in 22 states, JSV has been an active voice for crime victims. In Florida, the organizations was the primary sponsor of the Florida Victims' Rights Amendment to the Florida Constitution, adopted by the citizens of Florida in 1988. The amendment guarantees crime victims the right to be present and heard thought the justice process. More recently, JSV has been involved in efforts to secure the passage of a federal constitutional amendment to protect the rights of crime victims. Part of the amendment is designed to reduce unreasonable delays in capital cases. Many members of the organization have suffered first hand from the delays stemming from the current habeas corpus process for death penalty cases.

We believe our perspective will complement the brief of respondent and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

The three questions presented in this case require the Court to resolve a single foundational issue: To what extent, if any, has the statutory federal habeas corpus remedy for state prisoners, codified at 28 U.S.C. §2254, become so fundamental to our modern-day conception of due process that it is constitutionally protected? We believe there is a constitutionally protected core of the statutory writ; however, Title I of the Act, and the specific provisions challenged in this case, are consistent with the due process concerns that habeas corpus is designed to vindicate.

In addressing the foundational issue that underlies this case, the Court should recognize that the criminal procedure revolution of the 1960s and 1970s has fundamentally altered the relationship between federal and state law, and between federal and state courts. Before the 1960s, federal constitutional law served as a vague backdrop for detailed state criminal procedure law. But after the revolution, federal constitutional criminal-procedure law under the Fourth, Fifth, and Sixth Amendments occupied the field, completely displacing pre-existing state law in those areas. Initially, state courts resisted the invasion of federal law and defended pre-existing state law; in that historical context, habeas corpus served as a vital tool to ensure the supremacy of federal law. Today, however, state courts accept the preeminence of federal constitutional criminal-procedure law. State courts no longer resist the application of federal law solely because it is federal; rather, they operate as partners with the federal courts in the interpretation and application of a unified body of criminal procedure law.

Given these fundamental changes, the Court should develop a new, coherent model for habeas corpus. In a single criminal justice system involving both state and federal courts,

habeas corpus should serve the two primary goals of that system -- namely, the protection of innocent defendants and the deterrence of state-court misconduct -- while minimizing costs to the state and to crime victims that stem from lack of finality. These two goals are already reflected in this Court's habeas corpus jurisprudence, and Title I of the Act is consistent with these goals. Because Title I of the Act preserves the statutory writ's ability to serve these goals, it is consistent with due process concerns and passes constitutional muster.

The specific parts of the Act challenged in this case do not intrude on the important role of the statutory writ of habeas corpus in protecting innocent defendants and deterring state-court misconduct. Under the precedents of this Court, Congress has broad powers to make exceptions to the Court's appellate jurisdiction. Even under a more limited view of Congress's powers, however, the Act does not intrude on the Court's constitutional responsibilities, and therefore does not violate Article III. The Act does not make any changes in 28 U.S.C. §2254 that are substantial enough to warrant a broader approach to the original habeas corpus jurisdiction under 28 U.S.C. §2241. Finally, with respect to the Suspension Clause, an interpretation of that proviso in light of its constitutional history would limit it to protecting the Great Writ as known by the Framers. But even under a broader reading of the Clause, the Act is constitutional because it does not run afoul of due process concerns.

ARGUMENT

I. THE QUESTIONS PRESENTED IN THIS CASE MAY REQUIRE THIS COURT TO DECIDE TO WHAT EXTENT, IF ANY, THE STATUTORY FEDERAL HABEAS CORPUS REMEDY FOR STATE PRISONERS, CODIFIED AT 28 U.S.C. §2254, HAS BECOME SO FUNDAMENTAL TO OUR CONCEPTION OF DUE PROCESS THAT CONGRESS MAY NOT CURTAIL IT.

This case presents three questions: (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act) is an unconstitutional restriction of this Court's appellate jurisdiction; (2) whether Title I of the Act applies to original writs of habeas corpus under 28 U.S.C. §2241; and (3) whether Title I of the Act suspends the writ of habeas corpus in violation of Art. I, §9, clause 2 of the Constitution.

The answer to all three of these questions depends upon the Court's resolution of the following foundational issue: To what extent, if any, has the statutory federal habeas corpus remedy for state prisoners that is codified at 28 U.S.C. §2254 -- a remedy that was wholly unknown to the Framers -- become so fundamental to our modern-day conception of due process that Congress is prohibited by the Constitution from curtailing the application and scope of that remedy? The appropriate resolution of this issue compels the conclusion that the relevant parts of the Act do not exceed Congress's constitutional authority. Petitioner's requested relief should therefore be denied by this Court.

A brief examination of the Act and the three questions presented will reveal why it may be necessary in this case for the Court to determine the proper relationship between the statutory

writ of federal habeas corpus for state prisoners and fundamental modern-day conceptions of due process.[1]

Title I of the Act, whose relevant sections amend 28 U.S.C. §§2244, 2253, and 2254, along with Rule 22 of the Federal Rules of Appellate Procedure, alters the statutory habeas corpus remedy by, *inter alia*, restricting -- in a limited sense -- this Court's appellate jurisdiction. In amended 28 U.S.C. §2244(b)(3)(E), in particular, Congress placed new limits on second or successive applications for the statutory writ of habeas corpus: "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. §2244(b)(3)(E).

By its terms, section 2244(b)(3)(E) restricts this Court's appellate jurisdiction. A state prisoner who files a second or successive habeas petition must obtain from a "three judge panel of the court of appeals," *id.* at §2244(b)(3)(B), "an order authorizing the district court to consider [it]," *id.* at §2244(b)(3)(A). Whether granted or denied, a petitioner's motion for such an order "shall not be appealable and shall not be the subject of a petition . . . for a writ of certiorari," *id.* at §2244(b)(3)(E). In plain language, the Act takes away from the Court the jurisdiction to hear, on appeal or by means of a writ of certiorari, claims contained in a second or successive federal habeas corpus application, unless a three-judge panel of the court of appeals has previously authorized the district court to consider those claims.

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1 Consideration of the modern constitutional role of the statutory writ will also be important in resolving various challenges to other parts of the Act that will surely be raised, in the near future, in cases involving non-successive federal habeas corpus petitions.

The first question presented asks whether Congress's limited restriction of the Court's appellate jurisdiction in successive-petition habeas cases, pursuant to Title I of the Act, violates the Constitution. One relatively simple answer to this question is provided in a series of Reconstruction-era decisions of this Court. The Constitution grants the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, §2. As originally understood, this provision gives Congress broad latitude to regulate and make exceptions to this Court's appellate jurisdiction. *See* THE FEDERALIST NO. 80, at 541 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This Court's teachings have defined how far that latitude extends. Congress may strip the Court of jurisdiction, even in a pending case. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514-15 (1868); *but see Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n. 11 (Douglas, J., dissenting). However, the Court will narrowly construe any statute purporting to restrict its appellate jurisdiction, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1869), and Congress may not require the Court to decide in favor of a particular category of litigants or dismiss the case, *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871).

Under these precedents, the first question presented is answered easily. Under any plausible construction of the Act, section 2244(b)(3)(E) imposes restrictions on this Court's appellate jurisdiction. Unlike the statute in *Klein*, however, section 2244(b)(3)(E) applies without regard to which party was victorious in the court below. Assuming that *McCardle* and *Klein* still define the outer boundary of Congress's authority to restrict the Court's appellate jurisdiction, the Act is constitutionally valid because it does not extend beyond that boundary.

If, on the other hand, the Court does not choose simply to adhere to the 19th-century precedents of *McCardle* and *Klein*

in answering the first question presented, what is the best approach to defining the scope of Congress's authority to strip the Court of appellate jurisdiction? A number of theories have been advanced in support of various kinds of limits on Congress's appellate-jurisdiction-stripping authority. *See, e.g.*, Amar, "A Neo-Federalist view of Article III: Separating the Two Tiers of Federal Jurisdiction," 65 B.U. L. Rev. 205, 229-230 (1985); Bator, "Congressional Power Over the Jurisdiction of the Federal Courts," 27 Vill. L. Rev. 1030, 1031 (1982); Redish, "Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination," 27 Vill. L. Rev. 900, 902 (1982); Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001 (1965). Of those who have argued for recognizing substantial limits on such Congressional power, however, the most influential theory -- by far -- is the one articulated by Professor Henry M. Hart, Jr. *See* Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L. Rev. 1362 (1953). Under Hart's theory, Congress may make exceptions to this Court's appellate jurisdiction so long as those exceptions do not prevent the Court from fulfilling its core constitutional functions under Article III. In other words, "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." *See id.*, at 1365.

But in order to apply Professor Hart's theory (or any other theory similarly premised on the structure of Article III), this Court would first be required to define the extent, if any, to which the statutory writ of federal habeas corpus for state prisoners has become -- in the modern era -- indispensable to the Court's "essential role" in the "constitutional plan." Only then can it be determined whether the limited restrictions on the Court's appellate jurisdiction contained in the Act so infringe on the Court's core Article III responsibilities as to run afoul of the Constitution. The answer to this inquiry, in turn, depends on the

extent to which the statutory writ of habeas corpus is necessary to protect those interests that are at the core of modern-day notions of due process.

In a similar vein, the second question presented requires the Court to address the relationship between the statutory writ of federal habeas corpus for state prisoners and fundamental due process concerns. This Court has, over the years, developed a sensible approach for reconciling the scope of 28 U.S.C. §2254 (the statutory writ applicable to state prisoners) with that of 28 U.S.C. §2241, which confers on this Court and its Members original jurisdiction to issue writs of habeas corpus. That approach has severely restricted the original habeas corpus jurisdiction under section 2241 to those rare situations in which the usual procedure, as defined by section 2254, cannot be relied upon to protect the fundamental liberty interests that are at the core of due process. *See* U.S. Supreme Court Rule 20.4(a) ("[t]o justify [the Court's] granting of a writ of habeas corpus, [petitioners must show] that exceptional circumstances warrant the exercise of the Court's discretionary powers and that adequate relief cannot be obtained in any other form or from any other court"); J. LIEBMAN & R. HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 (2d ed. 1994) ("However the original habeas corpus jurisdiction of Supreme Court Justices and the Supreme Court itself is defined, that jurisdiction is virtually never exercised.").

In light of the Court's historic approach to habeas petitions filed under section 2241, the second question presented in this case might be better phrased as follows: Do the provisions of Title I of the Act so significantly alter the application and scope of 28 U.S.C. §2254 that this Court should correspondingly modify its historic approach to the original habeas corpus jurisdiction pursuant to 28 U.S.C. §2241? To put it another way, petitioner Felker -- who, prior to the enactment of the Act, surely

would have been unsuccessful in petitioning this Court for an original writ of habeas corpus under section 2241 -- urges, in effect, that the impact of the Act on successive petitions under section 2254 should compel the Court to create a broader scope for section 2241. If this is indeed the essence of petitioner's argument, then the answer to it depends on the Court's resolution of the same foundational issue that may underlie the first question presented -- namely, to what extent, if any, the statutory writ under 28 U.S.C. §2254 has become an essential component of due process.

Finally, the third question presented may also implicate the same foundational issue. According to petitioner, section 2244(b)(3)(E) also violates the Suspension Clause: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, §9, cl. 2. As with the first question presented, there may be a relatively simple response to petitioner's constitutional claim: As a matter of constitutional history, the Suspension Clause simply cannot be extended to the statutory writ applicable to state prisoners, which did not exist at the time of the Framing but was first enacted by Congress in 1867. *See Sanders v. United States*, 373 U.S. 1, 29 (1963) (Harlan, J., dissenting); *Swain v. Pressley*, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring); Fallon & Meltzer, "New Law, Non-Retroactivity and Constitutional Remedies," 104 Harv. L. Rev. 1731, 1779 n. 244 (1991); Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 170 (1978) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as know to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."); *but see Fay v. Noia*, 372 U.S. 391, 406 (1963) (referring to "intimations of support" for broader interpretation of Suspension Clause in some Court decisions). Indeed, the Framers

considered and rejected proposals to extend the Great Writ of the Magna Carta to both federal and state prisoners, *see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (Max Farrand ed., 1911), and the First Congress rejected the extension of federal habeas to state prisoners, *see* First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81-82 (1789) (limiting federal habeas to federal prisoners). Thus, according to this view, because section 2244(b)(3)(E) amends only the scope of the statutory writ, and not the Great Writ as it existed at the time of the Framing, it follows that section 2244(b)(3)(E) does not offend the Suspension Clause.

If, however, the Court chooses not to give the Suspension Clause a construction limited by its constitutional history, what is the alternative? Once again, in order to determine the modern-day meaning and application of the Suspension Clause, the Court would first be required to delineate the modern-day due process dimensions of the statutory writ of habeas corpus for state prisoners as defined by 28 U.S.C. §2254. If the Suspension Clause has evolved in meaning since the time it was enacted, or if it (alternatively) has taken on a new meaning as a result of the subsequent enactment of the Fourteenth Amendment (*see* Steiker, "Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners," 92 Mich. L. Rev. 862 (1994)), then the most appropriate way to determine its new meaning is in light of the fundamental concerns of due process. The core value underlying the Suspension Clause is the protection of federal citizens from arbitrary deprivations of liberty. To the extent that our definition of "federal citizenship" has evolved to include protection against arbitrary deprivations of liberty at the hands of state officials, *see* U.S. Const., amend. XIV, then the Suspension Clause may ensure that Congress, today, cannot entirely snuff out the statutory writ of habeas corpus.

In short, regardless of the particular form of the three questions presented in this case, the challenges to Title I of the Act which they express may well reduce to a single issue: Has some part of the statutory federal habeas corpus remedy for state prisoners, as contained in 28 U.S.C. §2254, become so fundamental to our modern-day notion of due process that Congress may not now curtail it? In order to address that issue, the Court must develop a coherent model of federal habeas corpus law, including a statement of the fundamental purposes served by the statutory writ. And in developing that model, it is important to decide what historical premises will serve as its foundation.

II. A SOUND MODEL OF HABEAS CORPUS SHOULD TAKE AS ITS POINT OF REFERENCE THE FACT THAT THE COURT'S CRIMINAL PROCEDURE DECISIONS HAVE REVOLUTIONIZED THE APPLICATION OF FEDERAL LAW BY STATE COURTS IN CRIMINAL CASES.

The statutory writ of federal habeas corpus under 28 U.S.C. §2254 has long been viewed as providing a federal-court remedy for violations of the federal constitutional rights of state criminal defendants. Although correct to a certain extent, this characterization of the statutory writ ignores -- even worse, obscures -- how much the criminal procedure revolution of the 1960s and 1970s altered the way that federal constitutional law is applied by state courts in state criminal cases.

In thinking about the proper modern-day role of habeas corpus in our federal system, concerns about the respective institutional roles of federal and state courts are much less relevant today than in the 1960s, and have been largely supplanted by the traditional concerns of criminal law -- the protection of innocent defendants and the deterrence of state-court misconduct in the interpretation and application of federal law.

As a result of the criminal procedure revolution, federal and state courts are no longer institutional adversaries defending their respective bodies of criminal procedure law. Instead, they are institutional partners in the interpretation and application of the same body of criminal procedure law -- namely, federal constitutional criminal-procedure law. This crucial historical shift, which has often been overlooked by courts and commentators alike, should serve as the starting point for the development of a coherent habeas corpus model.[2]

Before the 1960s, state criminal trials proceeded according to detailed rules of criminal procedure that were largely defined and applied by state officials. Federal law -- primarily the Due Process Clause of the Fourteenth Amendment -- operated only as a limit on how little protection a state could afford criminal defendants. Such limits left state legislatures and courts with ample room to develop and operate criminal procedure largely as they wished.

Then the world turned upside down. In the Fourth, Fifth, and Sixth Amendments, this Court found specific procedural guarantees regarding search-and-seizure, police interrogation, the right to counsel, jury selection, double jeopardy, and other matters. By incorporating all but a few of these guarantees into the Due Process Clause and thereby applying them to the States, this Court effectively replaced state criminal procedure with federal law. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring states to give warnings, based on the Fifth Amendment, before interrogating suspects in custody); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the Fifth Amendment privilege against self-incrimination); *Gideon v. Wainwright*, 372

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2 For a more fully developed version of the analysis presented in this section, see Joseph L. Hoffmann & William J. Stuntz, "Habeas After the Revolution," 1993 Sup. Ct. Rev. 65.

U.S. 335 (1963) (incorporating the Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment exclusionary rule).

Prior to this revolution in criminal procedure law, the prevailing approach by courts and commentators was to lump habeas corpus into the same category of "federal courts" law with Section 1983 litigation, the immunity of state governments and officials, the availability of federal injunctions against state criminal proceedings, and Eleventh Amendment doctrine. This approach to habeas corpus was driven, in common with its categorical companions, by the ideological struggle between theoretical approaches that Professor Richard Fallon aptly labeled "Federalism" and "Nationalism." *See* Fallon, "Ideologies of Federal Courts Law," 74 Va. L. Rev. 1141 (1988). Although few cases have been decided by this Court solely in terms of these Federalist and Nationalist approaches, they have served as rhetorical structures or as ideal models of the way the world of federal jurisdiction should work. *See id* at 1145-50.[3]

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3 According to Professor Fallon, Federalists tend to think of the Constitution as a document that preserves a certain balance between federal and state authority by carefully limiting federal power. They consider state and federal courts equally competent and equally dedicated to the vindication of federal rights; in other words, they believe in the parity of state and federal courts. They tend to exalt comity and deference to state court decisions and to discount the value of federal supremacy and the application of federal law by federal courts. The Framing of the Constitution provides the historical anchor for this ideology. *See id.* at 1151-57.

Nationalists, on the other hand, tend to think of the Constitution as a document centered on the Fourteenth Amendment's assurance that to every citizen of the Republic belongs certain fundamental rights, which federal courts should guard from state infringement. Nationalists believe that federal courts are more trustworthy than state courts, particularly when state courts are called on to vindicate federal rights. For this reason, they generally insist that federal interests require federal enforcement; they believe in the disparity of state and federal courts. Comity and deference to state court decisions matter less, in their

With only rare exceptions, judicial opinions and scholarly commentary on the role of habeas corpus in the federal system have remained enmeshed in the ideological debate between Federalism and Nationalism. *See Wright v. West*, 505 U.S. 277 (1992); *Coleman v. Thompson*, 504 U.S. 992 (1991); *Teague v. Lane*, 489 U.S. 288 (1989); *Stone v. Powell*, 428 U.S. 465 (1976); *Fay v. Noia*, 372 U.S. 391 (1963); *Brown v. Allen*, 344 U.S. 443 (1953); Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L.Rev. 441 (1963); Neuborne, "The Myth of Parity," 90 Harv. L. Rev. 1105 (1977); Peller, "In Defense of Federal Habeas Corpus Relitigation," 16 Harv. C.R.-C.L. L. Rev. 579 (1982).[4]

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view, than the Supremacy Clause and the value of allowing federal courts to apply federal law. Nationalists receive historical support for their view from the Reconstruction Era following the Civil War. *See id.* at 1158-64.

4 Even the popular arguments from congressional intent and habeas history, which initially appear to depart from this pattern, are actually disguised versions of the same debate between Federalism and Nationalism. The argument from congressional intent attempts to locate the role of habeas in congressional pronouncements running back to 1867, when the first great modern habeas statute was enacted. But this argument must eventually confront the fact that neither the 1867 Congress nor any of the Congresses that have amended the statute -- prior to the Act at issue in this case -- have directly addressed the key issues in habeas law: the substantive scope of the habeas remedy, or the proper rules of procedural default, harmless error, and retroactivity. Given such scanty guidance from Congress, the argument from congressional intent tends to fall back on parsing opinions of this Court thought to provide the relevant backdrop to congressional action. *See, e.g., Kenney v.Tamayo-Reyes*, 504 U.S. 1, 14-19 (1992) (O'Connor, J., dissenting). Such opinions, in turn, raise precisely the same litany of Federalist and Nationalist concerns that the argument from congressional intent initially appeared to avoid.

The argument from history, which looks more broadly to the traditions of habeas corpus law since 1867, attempts to identify in the enactments of Congress, the decisions of this Court, or both, a consistent ideological pattern that can be invoked to decide a particular case. *See, e.g., Wright v. West*, 505 U.S. 277, 285-295 (1992) (Thomas, J., plurality opinion); *id.* at 297-306 (O'Connor, J., concurring in the judgment); Liebman, "Apocalypse Next Time?

After the criminal procedure revolution, however, it no longer makes sense to think about habeas corpus primarily in terms of the ideological struggle between Federalism and Nationalism. The historical struggle between federal and state law, which still exists in many areas of constitutional law today, has been nearly eliminated in the realm of criminal procedure. Through the process of incorporation, federal constitutional law under the Fourth, Fifth, and Sixth Amendments has occupied the field -- completely extinguishing the pre-existing state criminal procedure law. Today, wherever federal constitutional criminal-procedure law exists, there is no longer any possibility of a direct conflict between that federal constitutional law and state criminal procedure law.

As a corollary, state courts have come to accept the preeminence of federal constitutional law in governing how state criminal investigations and trials should proceed. Because of the criminal process revolution, one of the foundational premises for the law of federal courts -- that federal constitutional law is foreign to state courts -- no longer holds true in the area of federal constitutional criminal-procedure law. If not indigenous, federal criminal procedure has at least become an accepted and familiar part of the legal landscape for state courts in nearly every criminal proceeding.

The Anachronistic Attack on Habeas Corpus/Direct Review Parity," 92 Colum. L. Rev. 1997 (1992). This historical approach runs into a serious obstacle, as well. As with every federal doctrine touching on criminal procedure, the role of habeas corpus was transformed by the criminal process revolution. For this reason, it is most likely pointless to draw elaborate lessons from cases prior to the 1960s. Without a more compelling foundation, the argument from history winds up in the same place as the argument from congressional intent: the ideological debate between Federalism and Nationalism.

This revolution in the law of criminal procedure has fundamentally changed the central role of habeas corpus in the federal system. Before the successful completion of the revolution, state courts often defied (both openly and surreptitiously) this Court's criminal procedure decisions. More importantly, this defiance occurred precisely because these decisions were based on federal law, and sought to supplant long-standing and familiar (to the state courts) bodies of state law. In this historical context, habeas corpus served as a powerful tool to ensure the ultimate supremacy of these newly articulated federal constitutional rights. By permitting federal courts to engage in collateral review of state court decisions in criminal cases, habeas corpus gave federal courts a vehicle for ensuring that state courts would accept this Court's decisions -- no matter how unpopular this invasion of federal law might have been.

Today, however, all serious debate in the area of criminal procedure law focuses on the content of the governing federal law, not on the propriety of such federal law being applied in state criminal cases. Today, whenever state courts disagree with the result or the reasoning of a Fourth, Fifth, or Sixth Amendment decision of this Court, it is not (as in the 1960s) because that decision is based on federal law rather than state law; instead, it is because there is an honest disagreement about the appropriate content of the federal law, which everyone -- state court and federal court alike -- agrees is the governing law. Indeed, many states now interpret their own constitutions as providing protections for criminal defendants that extend beyond federal law. *See generally* B. LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE (1991).

This wholesale transformation in the relationship between state law and federal law, and between state courts and federal courts, provides the Court with a sound basis for developing a new and coherent model of habeas corpus law. This new model

should take into account the fundamental changes wrought by the criminal procedure revolution. To the extent that federal constitutional criminal-procedure law has prevailed, and has completely replaced pre-existing state criminal procedure law, habeas corpus is no longer needed as a weapon in the war to ensure the supremacy of federal law over state law. Today, state courts no longer resist the application of federal constitutional law in criminal proceedings simply because it is federal law. Given this change, we should ask the following question: What role should the statutory writ of habeas corpus play in our federal system today?

III. HABEAS CORPUS SHOULD SERVE TO PROTECT INNOCENT DEFENDANTS AND TO DETER STATE-COURT MISCONDUCT; TITLE I OF THE ACT IS CONSISTENT WITH THIS MODEL OF HABEAS CORPUS, WHICH REFLECTS THE FUNDAMENTAL CHANGES WROUGHT BY THE CRIMINAL PROCEDURE REVOLUTION.

In the previous section we explained how the criminal procedure revolution has rendered the old "federal courts" model of habeas corpus law obsolete. In this section we will describe an alternative model of habeas corpus law, reflecting the fundamental changes wrought by the criminal procedure revolution of the 1960s and 1970s, that is based on modern-day conceptions of due process. We will also demonstrate how Title I of the Act is consistent with this new model of habeas corpus.

After the criminal procedure revolution, which rendered the traditional debate between Federalists and Nationalists largely irrelevant to habeas corpus law, what core values should be served by the federal statutory writ of habeas corpus for state prisoners? A proper analysis should begin by recognizing the costs and benefits of the habeas corpus remedy -- not in the old-

fashioned institutional terms of "federalism" and "comity," but in the context of a single, unified, federal-state criminal justice system. On one side of the ledger, the cost of habeas corpus is the suspension of a criminal judgment's finality pending the outcome of habeas corpus review. Habeas corpus also imposes substantial financial costs in the form of time and energy spent by courts, prosecutors, and (oftentimes) state-paid defense counsel. The State should not have to spend this time and money unnecessarily.

Equally important, habeas corpus remedies extract a significant toll in human suffering. In capital cases, for example, surviving victims' families must await the final conclusion of habeas review before seeing the case brought to a close and the penalty imposed. Protecting victims and surviving victims is an important value that must be considered in any evaluation of habeas corpus remedies. *Cf. Morris v. Slappy*, 461 U.S. 1, 14 (1983)("In the administration of criminal justice, courts may not ignore the concerns of victims."); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)("'Justice, though due to the accused, is due to the accuser also.'" (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)(Cardozo, J.) The psychological costs incurred by victims of crime, their families, and the law-abiding public generally -- who view "justice delayed" as "justice denied" -- must never be underestimated. Finally, delays dilute the deterrence dimension of swift punishment.

The benefits of the habeas corpus remedy, on the other hand, should be assessed in light of the primary goals of the criminal justice system. There are two such primary goals. First, only those defendants who are guilty should be convicted and punished. Second, all defendants, whether innocent or guilty, should be treated in a procedurally fair manner -- as defined, today, largely by federal constitutional criminal procedure law.

These two primary goals of the criminal justice system can serve as the basis for developing a coherent model of federal habeas corpus for state prisoners. In short, there are two good reasons to preserve a role, in our modern-day criminal justice system, for the federal statutory writ of habeas corpus for state prisoners -- (1) the statutory writ can serve as a crucial "safety valve" for the protection of innocent defendants in state criminal cases, and (2) the writ can also serve to ensure that state courts "toe the constitutional mark," *see Mackey v. United States*, 401 U.S. 667, 687 (1971) (Harlan, J., concurring in the judgment and dissenting), thereby helping to guarantee that all defendants in state criminal cases are treated in a procedurally fair manner (as defined by federal constitutional law).

In simple terms, our proposed new model of habeas corpus law operates on two tracks. The first track offers habeas corpus relief to any state prisoner who can make a sufficiently strong showing of innocence combined with a claim of constitutional violation. The second track permits a state prisoner who lacks a sufficient claim of innocence to obtain habeas corpus relief only if he can show that the state court acted unreasonably, thereby failing to "toe the constitutional mark" and warranting the application of a habeas corpus remedy designed to deter such misconduct.

Both of these goals, of course, lie at the core of our modern-day conception of due process. Preventing the punishment of innocent defendants and ensuring that state courts "toe the constitutional mark" are central to what this Court has found to be "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). Therefore, to the extent that the three questions presented in this case may depend on defining the constitutionally protected scope of the statutory writ, a coherent model of federal habeas corpus for state prisoners based on these two goals not only makes good

sense, but also passes constitutional muster under Article III, the Suspension Clause of Article I, and the Due Process Clause.

Indeed, prior to the enactment of the Act, these two goals were already substantially reflected in the Court's modern-day habeas corpus jurisprudence. With respect to the protection of innocent defendants, the Court created an exception to certain procedural habeas corpus restrictions for situations involving a "fundamental miscarriage of justice," defined in terms of factual innocence. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) (creating "fundamental miscarriage of justice" exception to procedural default doctrine). In addition, a majority of the Court acknowledged, at least in theory, the viability of a sufficiently strong innocence claim on habeas corpus even in the absence of an accompanying procedural constitutional violation. *See Herrera v. Collins*, 113 S. Ct. 853 (1993). With respect to ensuring procedural fairness, the Court recognized that the goal can be served adequately by limiting habeas corpus relief to cases where the state court misinterpreted clearly established federal law. *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989) (declaring new retroactivity doctrine that generally precludes retroactive application of "new law" to reverse state convictions that were valid under the prior law). Where the federal law was unclear at the time the state court acted, there is no basis for concluding that the state court requires deterrence, and therefore no good reason to grant habeas corpus relief.

Title I of the Act is remarkably consistent with the two-track model of habeas law we have proposed. For instance, the Act's amendments to 28 U.S.C. §2254 contain the following language:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding ....

28 U.S.C. §§2254(d)(1) and (2).

These subsections directly address the deterrence concerns that our model identifies as one of the two primary goals of habeas corpus. Subsection (d)(1) addresses pure questions of federal law, and limits the habeas corpus remedy to cases where the petitioner can show [1] that the state court decision ran counter to [2] clearly established federal law [3] as determined by this Court. Subsection (d)(1) also addresses mixed questions of law and fact; with respect to such mixed questions, relief can be granted only if the state court decision "involved an unreasonable application" of clearly established federal law as determined by this Court. Both of these clauses of subsection (d)(1) limit habeas corpus relief to cases involving a sufficiently high degree of conflict between the state decision and "clearly established" federal law as determined by this Court -- precisely the kinds of cases in which state courts need to receive a deterrence message. Subsection (d)(2) has much the same effect on

claims based on questions of pure fact; it requires the petitioner to show that the state court's factual determination was [1] unreasonable [2] in light of the evidence presented in the state court proceeding.

Taken together, subsections (d)(1) and (d)(2) cover every kind of case in which a state court might misconceive or (in the worst case) attempt to circumvent federal law: pure questions of law, pure questions of fact, and mixed questions involving the application of law to fact. In all three situations, under the deterrence track of our proposed model, habeas corpus relief should be granted only if the state court decision was unreasonable at the time it was made. The Act, in the aforementioned subsections (d)(1) and (d)(2), is consistent with this approach.[5]

The new standards of review prescribed by the Act manage to pursue the appropriate habeas corpus goal of deterrence without running afoul of the "deference or superiority" dichotomy characteristic of the traditional "federal courts" analysis -- under which courts and commentators engaged in fruitless debate over the so-called "parity" of state and federal

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5 Under our proposed model, with the vindication of innocence claims moved to a separate track, deterrence is not justified merely to minimize the number of good-faith errors that the State might make in its own favor. The deterrent effect of habeas corpus review on police and prosecutors is severely attenuated by the delay between their conduct and the subsequent grant of habeas relief. State courts feel the sting from habeas corpus review more sharply, because the time lag between their decision and the grant of habeas relief is much shorter and because the decision to grant habeas relief resembles appellate reversal. However, even the deterrence of state courts is not served by granting habeas corpus relief in cases where the federal law is unclear. In such cases, deterrence is not appreciably diminished by giving state courts the benefit of the doubt. Nagging concerns that a "reasonableness" standard of review gives state courts too much deference are misplaced in the new world created by this Court's criminal procedure revolution.

courts. The Act does not pretend to settle inter-sovereign disputes between the federal government and the states. Nor should it, based on what we have previously argued about the implications of the criminal procedure revolution. The Act merely limits the scope of substantive relief available under the habeas corpus statute, thus effectively redefining the statutory cause of action. In this manner, the Act is consistent with a view of habeas corpus under which deterrence has an important but limited role to play.

Section 106(b) of the Act, codified at 28 U.S.C. §2244(a) and (b), provides further evidence that the Act is consistent with the new model of habeas law that we have described:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2244(b)(2).

This provision is noteworthy for two reasons. First, even on successive applications, the Act permits a petitioner to obtain relief based on a claim of innocence. Second, however, that claim must be especially strong, given the petitioner's diminished right to obtain relief after his first application has already been denied. Put simply, this provision requires a petitioner to present new, "clear and convincing" evidence that the state convicted him only because of a constitutional error. It is, of course, possible for reasonable people to disagree about the appropriate level of protection for innocence claims contained in successive petitions. But determining that level requires consideration of a host of competing concerns -- not only of the protection due to habeas claimants but also the protection due to the interests in finality of the states and of crime victims. After evaluating all of these interests, Congress decided to protect only such claimants who can present new evidence that ought to substantially undermine the reviewing court's faith in the fundamental justice of the verdict. Due process, in our opinion, requires no more than this.

On balance, Title I of the Act appears to serve primarily the same two purposes -- protecting the innocent from unjust punishment and deterring misconduct by state courts -- as the new model of habeas corpus we have described. Moreover, the Act's treatment of deterrence strongly suggests that Congress has rejected the now-obsolete "federal courts" model of habeas corpus by narrowing the scope of the habeas corpus remedy without falling into the trap of attempting to resolve the so-called "parity" of state and federal courts. Whether consciously or unconsciously, Congress has recognized the implications of the criminal procedure revolution and acted accordingly. In so doing, it has also acted in a manner consistent with core due process values, and its efforts should therefore pass constitutional muster.

IV. THE PORTIONS OF THE ACT CHALLENGED IN THIS CASE DO NOT CURTAIL THE STATUTORY HABEAS CORPUS WRIT IN A MANNER INCONSISTENT WITH DUE PROCESS, AND THE CHALLENGES SHOULD BE REJECTED.

We have explained how fundamental changes in the relationship between federal and state law, and between federal and state courts, today require the development of a new, coherent model of habeas corpus. We have also outlined a proposed new model, designed to preserve the role of habeas corpus as an important component of due process, and we have demonstrated how Title I of the Act appears to be consistent with that new model. We now return to the specific challenges raised in this case, none of which are meritorious.

The first question presented is whether Title I of the Act, and in particular 28 U.S.C. §2244(b)(3)(E), is an unconstitutional restriction of this Court's jurisdiction. If this Court adheres to the approach of *Ex parte McCardle* and *Klein*, petitioner's challenge must be rejected. If, on the other hand, this Court adopts a broader view of Article III (such as that suggested by Hart), then the question becomes whether some part of the federal statutory writ of habeas corpus for state prisoners has acquired constitutional status, and is thus protected against Congressional appellate jurisdiction-stripping. Indeed, a part of the statutory writ is protected in this way. But there is nothing in section 2244(b)(3)(E) that could be said to violate the part of the statutory writ that we have so identified. Section 2244(b)(3)(E) simply places a greater share of the responsibility for adjudicating second and successive habeas corpus petitions in the hands of the courts of appeals, not the Supreme Court. This shift of responsibility for second and successive petitions -- which have long been subject to restrictions that did not apply to first petitions, *see, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991) -- does not, in any

way, prevent habeas corpus from performing its two vital functions. *See* Steiker, "Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?," 92 Mich. L. Rev. 862, 916-18 (1994) (concluding that restrictions on successive petitions do not violate the Suspension Clause).

The second question presented is whether Title I of the Act amends 28 U.S.C. §2241, which governs the original jurisdiction of this Court and its Members to grant writs of habeas corpus. As explained previously, this question effectively asks whether the Court should interpret its section 2241 original jurisdiction more broadly, in light of the changes Title I makes to section 2254. But the challenged portions of the Act, with respect to second and successive habeas corpus petitions, do not make any changes that are so significant as to warrant a change in this Court's approach to section 2241. Because section 2244(b)(3)(E) does not prevent habeas corpus from performing its two vital functions, there is no good reason for this Court to broaden the scope of original habeas corpus jurisdiction under section 2241.

Finally, the third question presented is whether the Act represents a suspension of habeas corpus in violation of the Suspension Clause in Article I of the Constitution. If the Suspension Clause is read in light of its constitutional history, as protecting only the Great Writ known to the Framers, then the Act creates no violation because it amends only the statutory writ. If, on the other hand, this Court concludes that the Suspension Clause should be interpreted more broadly to provide protection for the core of the statutory writ, then the question becomes whether some part of the statutory writ has become fundamental to our modern-day conception of due process. A part of the statutory writ is fundamental in this way. But, as we have argued, the part of the statutory writ that is so protected is

the part that protects innocent defendants from unjust punishment and deters state-court misconduct. Because section 2244(b)(3)(E) makes no changes that would undermine these two core purposes of habeas corpus, the Act is consistent with due process and does not offend even a broad reading of the Suspension Clause.

CONCLUSION

For the foregoing reasons, the Court should lift its stay of petitioner's execution and affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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